IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-996

LOUIS J. POMPONIO, JR.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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The government acknowledges the conflict between the holding of the court of appeals below and the holding of the Court of Appeals for the Second Circuit in *United States* v. *Brecht,* 540 F.2d 45 (1976).[1] It nevertheless opposes resolution of the conflict by this Court because the Travel Act indictment against petitioner charged interstate travel with intent to promote the violation of both the New York "commercial bribing" statute, and 18 U.S.C. § 215. It argues that the jury must have intended to convict petitioner upon both predicate statutes, and that therefore the conviction should not be disturbed even if the New York commercial bribing statute was improperly charged as an unlawful activity under the Travel Act.

The government's argument can find no support in law or logic, for several reasons:

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[1] The Courts of Appeal for the Second and Fourth Circuits likewise agree that a conflict exists. *United States* v. *Pomponio,* unpublished opinion, pet. for cert. at 2a.

1. The trial judge charged the jury that it could convict petitioner if it found that he traveled to further *either* of the predicate statutes (454a; brief in opposition at 6, fn. 6). It is quite possible that the jury could have found that petitioner traveled with intent to violate the New York statute but that he did not intend a violation of Section 215, a statute which did not apply to him at all. Other speculation as to how the jury might have decided is possible but pointless. "[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates* v. *United States,* 354 U.S. 298, 312. Accordingly, as the court of appeal implicitly recognized, petitioner's conviction can be upheld only if *both* the New York commercial bribing statute and 18 U.S.C. §215 were properly charged as "unlawful activities" under the Travel Act.[2]

The government's argument, based on the speculation that the jury would have convicted for violation of 18 U.S.C. § 215 is not only contrary to the principle of the decision in the *Yates* case *supra;* it also ignores the standard customarily applied by this Court in passing on petitions for certiorari. The issue of primary concern to this Court on such a petition is not whether this particular petitioner is guilty or innocent, but whether public interest and the proper administration of justice call for review by this Court. A conflict between circuits, particularly in connection with the interpretation of important criminal statutes always raises such a public interest.

[2] In this respect, also, the instant case is similar to *Brecht* where the defendant, like petitioner here, was convicted on several counts alleging violation not only of the Travel Act but also the Hobbs Act, 18 U.S.C. §1951. The Second Circuit, following the rule which the government denies here, held that "[s]ince the jury may have convicted only on the commercial bribery specification, we must reverse the conviction on these counts" 540 Fed.2d at 50.

If the standards customarily applied were to be applied here, the Solicitor General should have acquiesced in the petition.[3] Absent decision by this Court, a situation will be created which, in terms of the administration of justice, will be intolerable. The statute will be ineffective in the Second Circuit where most offenses of this nature are likely to arise (if they be offenses) and effective in the Fourth Circuit in which the issue is not likely to arise with any frequency. Such a conflict of circuits, if not resolved, will result in unlimited forum-shopping by the government. By definition, every charge under the Travel Act involves conduct which crosses state lines and, more often than not, conduct which crosses lines between circuits. The government is thus put in a position where it may affect the substantive rights of defendants by bringing a prosecution in one circuit rather than another, and by avoiding the Second Circuit completely. In fact in this case petitioner could have been tried in New York, in which event he would have had the benefit of the *Brecht* rule.

2. In any event, Section 215 by its terms is itself a commercial bribery statute, and not a statute involving bribery of a public official. Accordingly, if the Travel Act does not encompass commercial bribery as defined by New York Penal Law Article 180, for the same reasons it does not encompass commercial bribery as defined by Section 215.

The government's argument that Section 215 somehow is a traditional bribery statute (focusing upon corrupt ac-

[3] Failure to have done so in such a clear case is puzzling. Had the government applied for a writ in the *Brecht* case, we cannot conceive that the petition would have been denied. Whatever the motivation of the Solicitor General in his refusal to seek review of the *Brecht* decision at the present time, presumably saving it for consideration at some subsequent date, he should not be permitted to manipulate the calendar of this Court to achieve some tactical purpose of his own.

tivities by public officials) is patently preposterous: a bank officer is not converted into a public official simply because the bank's deposits are federally insured. This Court's offhand reference in *United States* v. *Nardello*, 393 U.S. 286, 293 n. 11 to "18 U.S.C. §§ 201-218" was obviously an overbroad citation to support the point intended to be made in that footnote, that the "unlawful activity" of bribery, as used in the Travel Act, was limited to bribery of corrupt government officials.

The government's unsupported assertion that "since Congress by Section 215 has prohibited the acceptance of a bribe by an officer of a federally-insured bank, it must have intended to include such bribery within the scope of the Travel Act" (Br. in Opp. at 7) is totally conclusory and begs the question. Section 215 antedated the Travel Act by considerable years. It does not use the term "bribe" or "bribery" in its text or its title. It does not involve corruption of or by public officials. It creates a misdemeanor penalty for the purely commercial improper acts of a bank officer. There is nothing in the language, legislative history or purpose of the Travel Act which would indicate that Congress intended to elevate the relatively minor scope and penalties of Section 215 into a major felony by encompassing it within the Travel Act.[4]

[4] *United States* v. *Karigiannis*, 430 F.2d, 148 (7th Cir. 19) and the other lower court cases cited by the government (Br. in Opp. at 7-8) all involved the creation of federal felonies based upon violation of state misdemeanor bribery statutes. It is quite legitimate to construe the Travel Act as manifesting a congressional finding that such state crimes presented a serious federal law enforcement problem and that they therefore should be treated, for federal purposes, as felonies. It is quite another thing to construe the Travel Act as manifesting a congressional purpose to override Congress' specific determination that violations of Section 215 warranted only misdemeanor penalties, especially where such overriding effect would occur only in the fortuitous circumstances of interstate travel. It is well to remember that Section 215 does not require interstate travel as a jurisdictional element, and that therefore the Travel Act is entirely unnecessary to reach the conduct prohibited. Thus, if Congress wishes to impose felony sanctions for violation of Section 215, it could and would have done so directly.

3. The government totally ignores the most anomalous aspect of petitioner's conviction under the Travel Act as predicated upon Section 215. The plain fact is that Section 215 does not make petitioner's actions a federal crime at all, and that Congress acted knowingly and intentionally in so limiting the scope of the statute. See Petition at 13. The government's effort to override the choices made by Congress through the misapplication of the Travel Act thus creates the absurd result of this case: petitioner was convicted of a felony and sentenced to three years in jail for traveling in interstate commerce to commit underlying acts which were not in violation of federal law at all as to him, and which were defined by federal statute as constituting only a misdemeanor as to the person whose acts were made criminal.

CONCLUSION

The government's effort to avoid resolution of a clear conflict between the courts of appeals is illogical, will be productive of confusion in the application of the federal statutes involved, and will result in unnecessary problems in the administration of justice. It is also contrary to well settled doctrine as to the review of jury convictions by appellate courts.

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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